Supreme Court, U. S.
FILED
SEP 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-325

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, a body corporate

v.

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455, and 515 IN THE DISTRICT OF COLUMBIA, et al.

JAMES R. THORNTON AND EDWARD DAVIS, ADMINISTRATORS – PARCEL 515-103,

Petitioners,

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, a body corporate

v.

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455, and 515 IN THE DISTRICT OF COLUMBIA, et al.

JAMES R. THORNTON AND EDWARD DAVIS, TRUSTEES – PARCEL 515-103,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMUEL A. CULOTTA
3210 Belair Road
Baltimore, Maryland 21213
(301) 563-0110

FRANK W. MARSALEK
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-4216

Attorneys for Petitioners

ABE DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-6837

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	i
PETITION FOR WRIT OF CERTIORARI	
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES, CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE	11
REASONS FOR GRANTING WRIT	26
CONCLUSION	36
APPENDIX:	
Judgment of U.S. Court of Appeals for District of Columbia Circuit (6/8/76)	A.1
Memorandum and Order of U.S. District Court for District of Columbia (7/15/75)	A.4
Order of U.S. District Court for District of Columbia (9/30/75)	A.6

INDEX OF AUTHORITIES

Cases:

Allegheny v. Mashuda Co., 360 U.S. 185	30

Page

Arndt v. Griggs,
134 U.S. 316 30

Bragg v. Weaver,
251 U.S. 57 30

Caribou Four Corners Inc. v. Truck Insurance Exchange,
443 F.2d 796, 799 (10th Cir.) 34

Catlin v. U.S.,
324 U.S. 229 30

Chicago Rock Island & Pacific Railroad Co. v. Stude,
346 U.S. 574 30

Convers v. Atchison, T. & S.F. Railroad Company,
142 U.S. 671 29

Covey v. Town of Sommers,
351 U.S. 141 30

Cuyahoga County, Ohio v. U.S.,
294 F.2d 775 30

Ernst & Ernst v. Hochfelder
__ U.S. __, No. __ 74-1042 (decided 3/30/76) . . . 33

Graciette v. Star Guidance, Inc.,
66 F.R.D. 424, 426 (D.C. S.D. N.Y. 2/14/75) 31

Hanna v. Stedman,
230 N.Y. 327 (1921) 30

Hanson v. Denckla,
357 U.S. 235 30

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238, 247 34

Huling v. Kaw Valley Railway,
130 U.S. 559 30

Page

In Re Estate of Duval,
133 Vt. 175,
332 A.2d 802, 803 (1975) 29

Lamarche v. Lamarche,
348 A.2d 22, 23 (R.I., 1975) 31

Madisonville Traction Company v. Saint Bernard
Mining Co.,
196 U.S. 239 30

McDonald v. Mabee,
243 U.S. 90 30

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306, 314-15 . . . . . 27, 28, 30

Nelson v. City of New York,
352 U.S. 103 30

New York v. N.Y., N.H. & H.R. Co.,
344 U.S. 293 30

North Laramie Land Co. v. Hoffman,
268 U.S. 276 30

Pennoyer v. Neff,
95 U.S. 714 30

Pierce v. Cook & Co., Inc.,
518 F.2d 720, 722, 723 (10th Cir., 1975) 34

Priest v. Las Vegas,
232 U.S. 604 28

Radack v. Norwegian American Line Agency, Inc.,
318 F.2d 538, 542 (2 Cir.) 34

Roller v. Holly,
176 U.S. 398 . . . . . 27, 30

Page

Schroeder v. City of New York,
371 U.S. 208 . . . . . 27, 30

State ex rel. State Highway Comm. v. Stringer,
77 Wyo., 310 P.2d 730 (1957) 30

U.S. v. 15.3 Acres of Land
(D.C.M.D. Pa., 1957),
158 F.Supp. 122, 124 . . . . . 29, 30

U.S. v. 70.39 Acres of Land
(S.D. Cal., 1958),
164 F. Supp 451 30

U.S. v. 625.91 Acres of Land in Dunklin County, Mo.
(S.E.D. Mo. 1943),
49 F. Supp. 997 30

U.S. v. Adamant,
197 F.2d 1 (C.A. Cal. 1952),
cert. denied Bullen v. Scoville, 343 U.S. 903 30

U.S. v. Dunnington,
146 U.S. 338 30

U.S. v. Miller,
317 U.S. 369 30

U.S. v. Petty,
327 U.S. 372 30

U.S. v. Throctmorton,
98 U.S. 61 33

Walker v. City of Hutchison,
352 U.S. 112 . . . . . 27, 30

Wuchter v. Pizzutti,
276 U.S. 13 30

Page

Rules, Constitutional & Statutory Provisions:

D.C. Code (1973)
Title 16, §16-1353 5
Title 16, §16-1354 6
Title 16, §16-1366 7
Title 16, §16-1368 7

Constitution of the United States, Amendment V 4

Rule 60(b), Federal Rules of
Civil Procedure 3, 8, 26, 27
subsection (4) 2, 3, 26
subsection (6) 4, 26, 34

Rule 71A, Federal Rules of Civil Procedure 14, 27
Rule 71A(c)(2) 9
Rule 71A(d)(3) 10, 24
Rule 71A(j) 11

28 U.S.C. 1254(1) 2

28 U.S.C. §§1346(a)(2) 1491 [Tucker Act] . . . 26, 35, A.3

Other Authorities Cited

29A C.J.S., Eminent Doman, Section 205 -
Conflicting Claims, page 921 29

7 Moore Federal Practice (1950 ed.), p. 308 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, a body corporate

v.

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455, and 515 IN THE DISTRICT OF COLUMBIA, et al.

JAMES R. THORNTON AND EDWARD DAVIS, ADMINISTRATORS – PARCEL 515-103,

Petitioners,

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, a body corporate

v.

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455, and 515 IN THE DISTRICT OF COLUMBIA, et al.

JAMES R. THORNTON AND EDWARD DAVIS, TRUSTEES – PARCEL 515-103,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James R. Thornton, Administrator d.b.n., c.t.a. of the Estate of Joseph Foller, Deceased, Edward Davis, Administrator d.b.n., c.t.a. of the Estate of Katherine Rohleder, Deceased, James R. Thornton, Trustee for certain heirs and devisees of Joseph Foller, Deceased, and Edward Davis, Trustee for certain heirs and devisees of Katherine Rohleder, Deceased, Petitioners, by and through their attorneys, SAMUEL A. CULOTTA and FRANK W. MARSALEK,

petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in the captioned cases.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported, but is included in the Judgment entered in this case (App., p. 1). Furthermore, the opinion of the United States District Court for the District of Columbia, with respect to the Motion of James R. Thornton and Edward Davis, Administrators (App., p. 4) has not been reported. No separate opinion was rendered by the United States District Court for the District of Columbia with respect to the Motion of James R. Thornton and Edward Davis, as Trustees, but is contained within its Order (App., p. 6).

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit (App., p. 1) was entered on June 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the just compensation stage of an eminent domain proceeding an owner who is known and whose address is readily ascertainable, but who does not reside within the jurisdiction of the condemning unit, may be relieved of a final judgment within Rule 60(b)(4), F.R.C.P., for lack of some form of personal contact, such as mailing.

2. Whether in the just compensation stage of an eminent domain proceeding known owners residing in the metropolitan area of Baltimore, Maryland, may be relieved of a final judgment within Rule 60(b)(4), F.R.C.P., when Notice of Condemnation was published only in the newspapers in the District of Columbia, where the property is located.

3. Whether in the just compensation stage of an eminent proceeding a nonresident owner, whose name is known, may be relieved of a final judgment within Rule 60(b)(4), F.R.C.P., for lack of being specifically named in the newspaper publication of the notice of condemnation.

4. Whether in the just compensation stage of an eminent domain proceeding a nonresident owner, whose address can be readily ascertained, may be relieved of a final judgment within Rule 60(b)(4), F.R.C.P., for insufficient due process notice of a hearing on the issue of just compensation.

5. Whether in an eminent domain action, after filing of the Declaration of Taking, depositing estimated just compensation in the Court's registry, and vesting of title in the condemning authority pursuant to statute, the in rem phase of the proceeding terminates, and owners may be relieved of a final judgment within Rule 60(b)(4), F.R.C.P., for lack of personal service of process of the second stage of the proceedings to determine just compensation and to apportion and distribute the fund awarded.

6. Whether in the just compensation stage of an eminent domain proceeding a final judgment can be set aside for fraud upon the Court within Rule 60(b), F.R.C.P.,

where an attorney representing an agency of the U.S. Government failed to offer into evidence or call to the Court's attention contradictory title reports in his possession affecting title interests of owners not present and permitted the use of one of these reports by two claimants to support their unverified Petitions upon which the Court awarded a portion of the fund to them.

7. Whether in the just compensation stage of an eminent domain action nonresident owners may be relieved of a final judgment within Rule 60(b)(6), F.R.C.P., where there was insufficient due process notice of the proceedings to determine just compensation and where an attorney for an agency of the U.S. Government failed to offer into evidence or call to the Court's attention contradictory title reports in his possession affecting title interests of owners not present and permitted the use of one of these reports by two claimants for the purpose of persuading the Court to award a portion of the fund to them.

8. Whether known and unknown nonresident owners in the just compensation stage of an eminent domain action by an agency of the U.S. Government in the District of Columbia were deprived of property without due process of law and their property taken for a public use without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

STATUTES, CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 16, D.C. Code (1973)

§16-1353. Declaration of taking; contents, deposit; transfer of title; determination, interest

"(a) In any action pursuant to this subchapter, the plaintiff may file in the cause, with the complaint or at any time before judgment, a declaration of taking signed by the acquiring authority empowered by law to acquire the property described in the complaint, declaring that the property is thereby taken for the use of the United States. The declaration of taking shall contain or have annexed thereto a —

(1) statement of the authority under which the public use for which the lands are taken;

(2) description of the lands taken sufficient for the identification thereof;

(3) statement of the estate or interest in the lands taken for public use;

(4) plan showing the lands taken; and

(5) statement of the sum of money estimated by acquiring authority to be just compensation for the property taken.

Upon the filing of the declaration of taking and of the deposit in the registry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in the declaration, title to the property in fee simple absolute, or such less estate or interest therein as is specified in the declaration, vests in the United States of America, and the property shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation therefor vests in the persons entitled thereto. The compensation shall be ascertained and awarded in the proceedings and established by judgment therein, and the judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from that date to the date of payment. Interest may not be allowed on as much thereof as has been paid into the registry. A sum so paid into the registry may not be charged with commissions or poundage. (Dec. 23, 1963, 77 Stat. 577, Pub. L. 88-241, §1, eff. Jan. 1, 1964.)"

§16-1354. Distribution of money deposited on declaration of taking; judgment for deficiency

"After the filing of the declaration of taking, and the deposit of the money in the registry of the court, as provided for by section 16-1353, the court, upon the application of the parties in interest, may order that the money so deposited, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. Upon the final award of compensation, the court shall enter judgment for the amount of any deficiency in the manner provided by rule 71A(j) of the Federal Rules of Civil Procedures. (Dec. 23, 1963, 77 Stat. 578, Pub. L. 88-241, §1, eff. Jan. 1, 1964.)"

§16-1366. Payment of compensation into court, vesting of title

"Payment into the registry of the court for the use of the parties entitled of the sum adjudged to be just compensation for the property to be condemned and taken, or for any parcel thereof, or any interest therein, pursuant to this subchapter, constitutes payment of the compensation. Upon the payment, the plaintiff is entitled to an order declaring that the title to the property in respect of which the compensation is so paid is vested in the United States of America. The money so paid into the registry of the court shall be deemed to be vested in the persons owning or interested in the property, according to their respective estates and interest, and the money shall take the place and stand in lieu of the property condemned. The court, upon the application of the plaintiff or of any party in interest, may determine and direct who is entitled to receive payment of the money so paid into the registry, and, in its discretion, order a reference to the auditor of the court or a special master to ascertain the facts on which the determination and direction are to be made. (Dec. 23, 1963, 77 Stat. 580, Pub. L. 88-241, §1, eff. Jan. 1, 1964.)"

§16-1368. Additional powers of court.

"Where the mode or manner of conducting a proceeding pursuant to this subchapter is not expressly provided for by law or rules of court in force under authority of law, the court may make all necessary orders and give all necessary directions to carry into effect the object and intent of this subchapter or any other laws conferring authority to acquire real property for the use of the United States. (Dec. 23, 1963, 77 Stat. 581, Pub. L. 88-241, §1, eff. Jan. 1, 1964.)"

Rule 60 — Federal Rules of Civil Procedure
"Relief from Judgment or Order"

"(b) Mistakes; Inadvertence; Excusable Neglect, Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall

be by motion as prescribed in these rules or by an independent action."

Rule 71A — Federal Rules of Civil Procedure
"Condemnation of Property"

"(c) Complaint.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation 'Unknown Owners'. Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant."

"(d) Process.

(3) Service of notice.

(i) Personal service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) Service of publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to 'Unknown Owners.'

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon."

"(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment."

STATEMENT OF THE CASE

By Deed dated November 19, 1851, recorded the next day among the Land Records of the District of Columbia, Damion Foller (brother of Joseph Foller and Katherine Rohleder) acquired title to the property which is the subject of this proceeding — designated for purposes of the herein condemnation as Parcel 515-103. He died in 1858, leaving a Will dated July 1, 1858, filed in the Office of the Register of Wills for the District of Columbia, devising a life estate interest to his wife, Mary E. Foller (who died July 4, 1884), and upon her death to be equally divided among his children then living, namely, Elizabeth L. Foller and John Foller. Elizabeth died testate, resident and domiciled in the District of Columbia, on September 23, 1886, and her brother, John, died intestate in Baltimore, Maryland, on August 13, 1906.

On March 15, 1905, the City of Washington sold the subject property at tax sale to Charles H. Wiltsie and title was conveyed to him by the Commissioners of the District of Columbia by Indenture dated April 7, 1907, duly recorded on May 6, 1907. Thereafter, by Deed dated May 23, 1908, duly recorded on June 5, 1908, Jerry J. Dugan purchased Parcel 515-103 from Mr. Wiltsie and wife. The said Mr. Dugan then conveyed the property to Joseph Foller and Katherine Rohleder, as tenants in common, by Deed dated June 4, 1908, duly recorded on June 5, 1908.

Katherine Rohleder died testate in Baltimore City, Maryland, on February 18, 1910, and her brother, Joseph Foller, died testate in Baltimore City, Maryland, on November 16, 1912, with Petitions of Probate being granted by the Orphans' Court of Baltimore City, Maryland, on February 21, 1910 and December 11, 1912, respectively. On October 11, 1945, their Wills were duly filed and recorded in the Office of the Register of Wills for the District of Columbia. Both Estates were never closed, with costs of administration unaccounted for.

On March 19, 1975, James R. Thornton was granted Letters of Administration d.b.n., c.t.a. on the Estate of Joseph Foller, Deceased, by the Orphans' Court of Baltimore City, and on April 8, 1975, Edward Davis was granted Letters of Administration d.b.n., c.t.a. on the Estate of Katherine Rohleder, Deceased. Subsequently, on April 16, 1975, exemplified copies of their Letters were duly filed with the Register of Wills for the District of Columbia.

On June 28, 1971, District of Columbia Redevelopment Land Agency [DCRLA] — an agency of the U.S. Government — filed in the U.S. District Court for the District

of Columbia its Complaint to condemn, *inter alia*, Parcel 515-103, and named the following as persons, firms or corporations having or claiming an interest in the parcel. whose names were then known:

> "Unknown heirs, alienees and devisees of Catherine Rohleder, deceased; unknown heirs, alienees and devises of John Foller (unmarried), deceased 1906; unknown heirs, alienees and devisees of Joseph Foller, deceased 1912; unknown heirs, alienees and devisees of Mollie Thornton, deceased; Richard B. Tippett, Trustee; Elizabeth L. Foller, deceased; Leopold Kapolinski, Trustee; John W. Schaeffer, Trustee; Rev. F. J. Tewes; Josephine Cord; Elizabeth Cord; Catherine Schaeffer; Mary Louisa Bergling, Kate Bergling; Louisa Bergling; Louisa Ruppert; Little Sisters of the Poor, and St. Joseph's Male Orphan Asylum."

Simultaneously, DCRLA filed a Declaration of Taking and deposited into the registry of the District Court the sum of $27,500.00 as estimated just compensation. Upon instructions of DCRLA, personal service of process was made on Michael M. Doyle, Esquire and accepted by him on July 2, 1971 for the unknown heirs, alienees and devisees of Joseph Foller, deceased, Mollie Thornton, deceased, John Foller, deceased, and Catherine Rohleder, deceases, and for Elizabeth L. Foller, deceased. DCRLA also instructed that personal service of process be made on Little Sisters and St. Joseph's [hereinafter referred to as "Institutions"] and thereafter on July 2, 1971 and July 6, 1971, respectively, service of process was accepted by their respective attorneys. There is no record of personal service of process on any of the other persons named *supra* as having an interest.

Upon the filing of the Declaration of Taking and the deposit of estimated just compensation, title to the subject parcel vested in DCRLA [Title 16, Section 1351 to 1368 inclusive, of the D.C. Code (1967 ed.)].

On February 1, 1972, DCRLA filed a Certificate for Service by Publication, wherein it certified that those persons heretofore set out as possible claimants — with the exception of Little Sisters and St. Joseph's — could not be personally served because after a reasonably diligent inquiry, the places of residence could not be ascertained by DCRLA or if ascertained, the places of residence were beyond the territorial limits of personal service as provided in Rule 71A, Federal Rules of Civil Procedure.

On March 27, 1972, DCRLA certified that Notice of the condemnation action had been published once a week for three successive weeks, that is on February 7, 1972, February 14, 1972 and February 22, 1972, in two District of Columbia newspapers and that prior to the last publication, a copy of the Notice was mailed to the unknown heirs, alienees and devisees of Catherine Rohleder, deceased, John Foller, deceased, Joseph Foller, deceased, and Mollie Thornton, deceased, and to Elizabeth L. Foller, deceased, at their last known address, namely c/o Michael M. Doyle, Esquire of Washington, D.C.

Mr. Doyle — who in the 1940's had represented Mollie Thornton (daughter of Joseph Foller) against the heirs and devisees of Katherine Rohleder, deceased, in a partitioning action in the District of Columbia, and who for a great number of years had represented a real estate agency which managed the subject parcel, as well as other properties formerly owned by Joseph Foller and Katherine Rohleder — did have knowledge as to the names and

addresses of many of the heirs and devisees of Joseph Foller and Katherine Rohleder. Mr. Doyle had never been retained by any of the heirs and devisees of Joseph Foller and Katherine Rohleder to represent them in the aforesaid condemnation action; he never filed an appearance in said action as counsel for these defendants; nor did he file an Answer on their behalf; nor did he appear at a pretrial conference held on December 7, 1972 or for the trial on the issue of just compensation on January 26, 1973, despite Court notice thereof to him. [All of the aforegoing was substantiated by the testimony of Mr. Doyle during a hearing held on June 27, 1975, *infra*].

A hearing to determine just compensation was held before the District Court on January 26, 1973. Counsel for Little Sisters, who formally entered his appearance on January 24, 1973, and counsel for St. Joseph's, who never formally entered his appearance, were present. DCRLA moved to waive a jury trial and prayed for a court trial, to which counsel for the Institutions agreed. An affidavit of a qualified real estate appraiser was offered into evidence, placing a value of $41,850.00 for Parcel 515-103. This valuation was agreed to by counsel for the Institutions and accepted by the Court.

Respective counsel for the Institutions then each submitted unverified Petitions warranting a one-quarter (1/4) interest by each in the parcel, supported by a title policy dated January 10, 1973 of Lawyers Title Insurance Corporation, which had been prepared by said title company for DCRLA. The Court immediately signed Orders for Payment of Money in Satisfaction of Judgment. No testimony or any other probative evidence whatsoever was taken as to the chain of title, nor of any possible conflicting interests of any of the 18 parties and their known and unknown heirs previously designated in the

Complaint and Notice as possible claimants. Counsel for DCRLA concurred with the Orders of Distribution and signed his consent thereto on the face of the Orders at the request of the District Court in order to facilitate payment of said awards. This just compensation hearing, consisting of evidence related to valuation and to apportionment and distribution of the fund, was commenced and completed within 15 minutes, and the transcript thereof consisted of six letter-size, double-spaced pages.

On February 8, 1973, a Judgment Determining Compensation was entered, wherein DCRLA was ordered to deposit an additional sum of $14,300.00 into the registry of the Court in satisfaction of the judgment. An Amended Judgment Determining Compensation was entered on February 26, 1973 for the purpose of correcting the sum of the additional deposit to $14,350.00.

On February 8, 1972, two checks for $10,462.50 each were issued and paid over to Lawyers Title, pursuant to the Distribution Orders of January 26, 1973. Thereafter, in June, 1973, said title company, after deducting outstanding real estate taxes, paid to each of the Institutions the sum of $10,132.76.

On May 13, 1975, the Administrators of the Estates of Joseph Foller and Katherine Rohleder filed a "Motion to Set Aside Distribution Orders of January 26, 1973 and to Order Re-Deposit of Sums Erroneously Paid Out of Court's Registry With Respect to Parcel 515-103" — in effect a Motion under Rule 60B, Federal Rules of Civil Procedure — wherein they set forth, under oath, a detailed history of the chain of title to the parcel, with specific references to land, probate and court records of the District of Columbia, and indicated that had DCRLA

performed a reasonably diligent search of the aforesaid records, it would have ascertained the names of the record title owners of the subject parcel. A Title Certificate dated May 2, 1975, prepared by Frank W. Marsalek, Esquire, an expert title examiner in the District of Columbia, was attached to this Motion, certifying that the parcel was marketable and vested in fee simple in Joseph Foller and Katherine Rohleder, as tenants in common, or their respective successors in interest, under Deed from Jerry J. Dugan dated June 4, 1908 and recorded June 4, 1908 in Book 3165, page 19, of the Records of the District of Columbia.

The Institutions in their Memoranda in Opposition argued that the Motion was untimely under Rule 60B, that the Administrators had no standing, and that the Movants did not dispute Notice of Publication or deny having actual knowledge. That the notice of the pendency of the proceeding was appropriate and many of the heirs had actual notice, as well as notice by publication. However, if the Motion was timely and the Administrators had standing, an evidentiary hearing was required to resolve the issues raised. Further, that the claim that the heirs received no notice of the hearing was misleading, the question being whether they had notice of the proceeding itself.

The Administrators in a Reply Memorandum argued that their Motion was timely; that none of the known and unknown heirs received any notice, actual or constructive, of a hearing on just compensation; that the administrators had standing because the estates were never closed and costs of administration unpaid; that a reasonably diligent search of the records would have

revealed that a dispute as to title to the property existed between the Institutions and the heirs; that at the just compensation hearing the Institutions did not submit any probative evidence of their title; and that the Administrators have been deprived of due process of law. Further, the Administrators argued that a constructive fraud was committed upon the District Court because DCRLA and the Institutions failed to perform a legal duty, in that they negligently failed to conduct a reasonably diligent search of the records.

On June 27, 1975, a hearing was held on the Administrators' Motion, with argument and testimony only on the issues of constructive fraud and notice. In the course of this hearing, the Court asked counsel for the Administrators, assuming there was a mistake by the title company as to title to the subject property, whether there was any indication of any colaboration or knowing misrepresentation to the Court by DCRLA or the Institutions. Counsel disclaimed any such knowledge at that time.

On the issue of notice, Mr. Doyle was called as a witness by the Institutions and testified as to his background knowledge of Parcel 515-103 and his contact from time to time with certain Foller and Rohleder heirs and devisees, or their attorneys; and that over the years he had collected rents and paid taxes — up to the time of accepting service of the Notice of the condemnation proceedings on July 2, 1971. He mailed a letter dated July 29, 1971 to many - but not all - of the Mollie Thornton/Joseph Foller heirs, stating that "The Government has filed a condemnation suit in our local Court and has deposited what it considers a sufficient payment for the lot, namely $27,500.00", and suggesting

that if they were interested to get in touch with him. Mr. Doyle admitted that no such notice was mailed to any of the Rohleder heirs and, further, that he had never been retained by any of the Foller or Rohleder heirs to represent them in this condemnation proceeding.

Mr. Doyle testified that on January 23, 1973 he mailed letters to William G. Thornton of Ellicott City, Maryland, and to June T. Cobb of Roanoke Rapids, North Carolina — which were admitted into evidence — giving them the following notice of the January 26, 1973 hearing on just compensation: "This is to inform you that the matter of condemnation of the above property is coming up again this week in the local District Court".

Mr. Doyle further testified that he had communicated by mail on October 23, 1973 and January 4, 1974 with Samuel A. Culotta, Esquire, of Baltimore, Maryland, who had written to him as attorney for Thelma Thornton (one of the 22 Foller/Thornton heirs) relative to the condemnation proceeding. These letters, which were admitted into evidence, stated that "The U.S. Government has taken over 403 K Street, an unimproved lot, and deposited in Court $41,000. The Molly Thornton heirs have a 1/4th interest in this deposit." Mr. Doyle at no time stated, either in his testimony or in his letters, that he had informed Mr. Culotta that a Final Judgment Determining Compensation had been entered by the Court on February 8, 1973, nor that a hearing thereon had been held on January 26, 1973.

Edward Davis, Administrator of the Estate of Katherine Rohleder, (age 59) of Baltimore, Maryland, testified that

he had never received any communication by telephone, letter or by any other means from Mr. Doyle or anyone else concerning the condemnation proceeding. Further, that Mr. Doyle had never represented him for any purpose, that he first learned about the condemnation proceedings from his attorney in 1975, and that he did not known any of the Foller/Thornton heirs.

On July 7, 1975, the Institutions submitted a Supplemental Memorandum to show title in them independent of the aforementioned title policy of Lawyers Title dated Janyary 10, 1973, and attached a "report of title", consisting of a brief paragraph on the letterhead and form of Columbia Real Estate Title Company, certified as of September 27, 1886 that Pursuant to the Last Will and Testament of Elizabeth L. Foller, the Institutions each owned 1/4th of the parcel. However, the masthead of said title company indicates that it was founded in the District of Columbia in *1887*. The Administrators replied on July 14, 1975 and submitted a copy of a title policy dated June 3, 1969 prepared by Lawyers Title for DCRLA (which counsel for the Administrators had obtained from DCRLA after the hearing of June 27, 1975), in which it was stated that fee simple title was in the heirs and devisees of Joseph Foller and Katherine Rohleder, with an exception indicating that the interest of these heirs may be subject to an interpretation of the Last Will and Testament of Elizabeth L. Foller and listing the names of 13 specific and residuary legatees under the Will of Elizabeth, including St. Joseph's and Little Sisters. This policy is patently contradictory to the title policy of Lawyers Title dated January 10, 1973 stating that fee simple title was 1/4th in the Rohleder heirs, 1/4th in the Foller/Thornton heirs, 1/4th in Little Sisters and 1/4th

in St. Joseph's. However, the title policy of June 3, 1969 was never offered in evidence nor called to the attention of the District Court at the January 26, 1973 hearing on just compensation.

Without ruling on the allegations as to the validity or the effect of the contradictory title policies on the prior proceedings, on July 15, 1975, the District Court denied the Motion of the Administrators, finding that prior to the just compensation proceeding full and adequate notice to all "unknown owners" was given by publication; that there was also actual notice to many of the Foller and Rohleder heirs but none responded; and that no basis exists for re-opening of a final judgment where Movants had ample notice, slept on their rights for more than one year and failed to present any evidence of extrinsic fraud.

The question of standing of the Administrators to file their aforesaid Motion was raised by the Institutions and left undecided by the District Court in its Memorandum and Order of July 15, 1975 [App., p.]. Therefore, on September 3, 1975, James R. Thornton, as Trustee pursuant to Trust Agreements with 17 heirs and devisees of Joseph Foller, deceased, and Edward Davis, as Trustee pursuant to Trust Agreements with 38 heirs and devisees of Katherine Rohleder, deceased, filed a Rule 60B Motion, similar to the Motion of the Administrators but broader in scope. This verified Motion extensively set forth the history of the proceedings from June 28, 1971 (the date of the filing of the condemnation proceedings) to June, 1973 (the date when payment was made to the Institutions by Lawyers Title). It also set forth the chain of title to the parcel,

supported by exhibits and authenticated documents. The Motion further added that none of the heirs and devisees of Joseph Foller and Katherine Rohleder received a copy of the Notice of condemnation, nor did any of them have occasion to read the publication of the condemnation in the Washington, D.C. newspapers, and that none of these heirs and devisees had authorized Michael M. Doyle to represent them or accept service on their behalf. Further, that none of them had received any correspondence or other notice from Mr. Doyle specifically stating the time, date and place of the pre-trial conference nor of the hearing to determine just compensation. Moreover, that Mr. Davis, Trustee for the Rohleder heirs, had no knowledge of any correspondence or notice from Mr. Doyle to any of the heirs and devisees of Katherine Rohleder. The Trustees' Motion further averred that had DCRLA performed a reasonably diligent search, it would have discovered from the official land, probate and court records of the District of Columbia the names and addresses of the heirs and devisees, and particularly that the great majority of them lived within the metropolitan area of Baltimore. Despite DCRLA's knowledge that Mr. Doyle had the names and addresses of certain of the heirs and devisees, it did not at any time make an effort to give these heirs notice of the condemnation proceeding, both of the first phase, that is, the taking, and the second phase of determining just compensation, by way of mailing a letter or giving constructive notice by publication in the newspapers of metropolitan Baltimore.

The Motion further indicated that four heirs of Katherine Rohleder, namely: the heirs-at-law of Joseph Rohleder, deceased; George C. Rohleder and Mamie H.

O'Dwyer, surviving devisees of George Rohleder, deceased; John J. Rohleder, sole heir-at-law of Theodore Rohleder, deceased; and Roscail Davis, sole devisee of Margaret Wohner, deceased, stated in the January 10, 1973 title policy of Lawyers Title as having an interest in the subject parcel, were not named in the Notice of Publication and evidently lumped in among the "unknown heirs". DCRLA stated in its Response to this Motion that it used a title report prepared by Lawyers Title dated January 22, 1971 for the preparation and filing of the condemnation proceeding, which report included the aforesaid names as those in whom fee simple title was vested. However, these names were not included in the newspaper publication and were not listed in DCRLA's Notice of condemnation nor in its Certificate of Publication.

As a result of the insufficiency of notice, both actual and constructive, the heirs and devisees of Joseph Foller and Katherine Rohleder were deprived of due process notice of the taking on June 28, 1971 and of the just compensation hearing of January 26, 1973, as set forth in the Trustees' Motion.

The Trustees' Motion also averred that the failure of the attorney for DCRLA to offer into evidence or call to the attention of the District Court that its January 10, 1973 title policy, which it permitted the Institutions to use in support of their unverified Petitions warranting title, was contradictory to another title policy dated June 3, 1969, prepared by the same title company on the same parcel, which it had in its possession and which stated in Schedule "A" that the heirs and devisees of Joseph Foller and Katherine Rohleder were the sole record title owners of the parcel, subject to an exception

in its Schedule "B" involving an interpretation of the Last Will and Testament of Elizabeth Louise Foller, amounted to fraud upon the Court.

The Trustees further averred that DCRLA and the Institutions committed a fraud upon the District Court in that none of them performed a reasonably diligent search of the records of the District of Columbia, for if they had done so, they would have learned that at no time did the Institutions have any ownership interest in the parcel.

Simultaneously with the filing of their Motion, the Trustees requested an immediate hearing.

On September 15, 1975, the Institutions, in their Joint Memorandum in Opposition to the Trustees' Motion, asserted that the issues raised by the Trustees were precisely the same as those in the Administrators' Motion, on which the Court had already ruled [see Memorandum and Order of July 15, 1975, App., p. 4]. However, they admitted that in the pending Motion, the Trustees had included "some highly-debatable assertions concerning whether the Thornton and Rohleder heirs actually knew of the pendency of this proceeding. Whether there was actual knowledge, of course, would be irrelevant unless the movants could show that the notice by publication, given pursuant to Rule 71A(D)(3)(ii), was improper. This the movants have failed to show."

DCRLA on September 9, 1975 filed a Response to the Trustees' Motion disclaiming any control or interest in the distribution of the funds on deposit for the parcel. It further denied that it did not diligently search the records to ascertain the names of the parties entitled to

just compensation, that it gave improper notice of condemnation to the heirs, and that it was involved in a prepetration of fraud upon the Court. DCRLA asserted that it followed its normal procedure in hiring a qualified real estate company to search the land records and report the names of all persons having an interest. It attempted to explain away the contradictions between the title policies of June 3, 1969 and January 10, 1973 by stating that "because of normal transfers of property, it is not unusual to have an old title report reflect a different ownership of a particular property"; and that it made an independent inquiry and through this effort contacted Mr. Doyle who, as a result, was served with notice of the condemnation proceedings as the representative of the unknown heirs of Joseph Foller and Katherine Rohleder. DCRLA denied knowledge that Mr. Doyle was not authorized to accept service because he in fact did accept service and that nevertheless, the heirs were properly served by publication.

The District Court, upon consideration of the Motion of the Trustees and the Memoranda submitted in support thereof and in opposition thereto, on September 30, 1975, without a hearing, denied said Motion. [App., p 6].

Timely appeals were filed with the U.S. Court of Appeals for the District of Columbia Circuit and thereafter consolidated by order of the appellate court. The appeals were briefed and argued and the appellate court on June 8, 1976 affirmed the judgments of the District Court appealed from, finding no abuse of discretion [App., p. 1].

REASONS FOR GRANTING WRIT

The brief Order and Memorandum of the U.S. Court of Appeals for the District of Columbia Circuit dated June 8, 1976 affirmed the judgments of the District Court for the reason that it found no abuse of discretion in the District Court's denial of Petitioners' post-judgment motions to set aside the distribtuion orders of January 26, 1973 and to order the re-deposit of sums paid out for the condemned parcel. As a result of the appellate court's decision, Petitioners have been denied relief from that stage of the condemnation proceedings apportioning and distributing the just compensation fund awarded, for the reasons stated in their verified post-judgment motions, for which reasons Petitioners contend relief is provided in Rule 60(b)(4) and (6) and Rule 60(b) generally of the Federal Rules of Civil Procedure— that is because the judgment is void, for any other reasons justifying relief from the operation of the judgment, and for fraud upon the court — despite the fact that more than one year has elapsed since the aforesaid final judgments were entered on January 26, 1973.

The appellate court's decision implies that if the Petitioners are entitled to relief, it may be obtained within a Tucker Act proceeding (28 U.S.C. §§1346(a)(2), 1491). However, Petitioners contend that the facts averred in their verified post-judgment motions and in the testimony taken on the motion of the Petitioner-Administrators on June 27, 1975, entitle them to Rule 60(b) relief and that the District Court abused its discretion and the appellate court erred in affirming the judgments of the District Court.

The reasons for Petitioners' request for Rule 60(b) relief raise vital questions of due process affecting real property rights in eminent domain proceedings. For if the procedure condoned by the District Court does not justify Rule 60(b) relief, then it means that known nonresident owners may be deprived of their property, compensation determined and the fund apportioned and distributed without notice and the right to be heard, merely upon notice in a newspaper published in the jurisdiction of the condemning unit.

Petitioners contend that to the extent Rule 71A, as construed and applied, permits just compensation to be determined and the fund awarded to be apportioned and distributed merely on notice by publication, whether to known resident or nonresident owners, that this is repugnant to the Fifth Amendment to the United States Constitution. This follows from this Court's opinions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; *Walker v. City of Hutchinson*, 352 U.S. 112; *Schroeder v. City of New York*, 371 U.S. 208; and *Roller v. Holly*, 176 U.S. 398. Although this Court has not yet specifically ruled on a case involving the validity of local notice by publication on a known nonresident, it would seem a reasonable extension of the aforesaid opinions that the minimum requirements of due process notice would demand some form of personal contact, such as mailing.

The question in every case is whether the notice given was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection, * * *" This must be done

"with due regard for the practicalities and peculiarities of the case * * *". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15.

Petitioners submit that the notice in the herein eminent domain proceeding was insufficient, since a reasonably diligent search of the records of the District of Columbia would not only have ascertained most of their names, but their nonresident addresses as well and, therefore, a letter enclosing the notice of condemnation could easily have been mailed to them. *Priest v. Las Vegas*, 232 U.S. 604.

Surely there can be no excuse for not even naming four of the known nonresident Rohleder heirs in the notice that was published in the District of Columbia. For these reasons, among others to be hereinafter developed, the final judgments apportioning and distributing the just compensation fund are void and the Petitioners entitled to relief under Rule 60(b)(4).

Petitioners' Motions state under oath that none of the ascertainable heirs and devisees of Joseph Foller and Katherine Rohleder, the record title holders of the subject parcel, including Joseph Foller and Katherine Rohleder, resided in the District of Columbia; in fact, the great majority lived in metropolitan Baltimore. Further, the Baltimore, Maryland Wills and testamentary Letters of Administration of the record title holders, duly authenticated, were filed in the Office of the Register of Wills for the District of Columbia in 1945. Petitioners submit that notice by publication in the District of Columbia of the just compensation stage of an eminent domain proceeding would not be sufficient to meet due process requirements to known nonresident owners. This Court has not had occasion to rule on this issue and, therefore,

its uniqueness is suggested as a reason for granting Certiorari. See *In Re Estate of Duval*, 133 Vt. 175, 332 A.2d 802, 803 (1975).

Petitioners further contend that the just compensation stage of an eminent domain proceeding, and particularly that phase wherein the fund awarded is apportioned and distributed, since it determines the rights of claimants to the fund in court — especially where on the face of the notice of condemnation many claimants are made defendants — is a personal action and requires more than mere notice by publication, if not personal service of process. Moreover, if the possibly conflicting claimants cannot be served, then the court should be required to appoint counsel for absent, unknown, minor, and incompetent claimants. Further, that the fund should not be awarded on unverified petitions of attorneys for claimants warranting title, supported by a title policy obtained by the condemning authority. Rather, under the circumstances, the court in fairness should require probative evidence of title from claimants who have appeared at the just compensation hearing. *29A C.J.S.*, Eminent Domain, Section 205 - Conflicting Claims, page 921 and cases cited therein. *U.S. v. 15.3 Acres of Land* (D.C., M.D. Pa., 1957), 158 F. Supp. 122, 124. *Convers v. Atchison, T. & S.F. Railroad Company*, 142 U.S. 671.

Prior hereto this Court has not ruled that the just compensation stage of an eminent domain proceeding is an action in personam. Petitioners respectfully submit that the prior decisions of this Court, as well as other federal and state courts, are conflicting and vague as to the character of the rights of owners to funds

awarded in just compensation proceedings. *Schroeder, v. City of New York, supra; Cuyahoga County, Ohio v. U.S.*, 294 F.2d 775; *Allegheny v. Mashuda Co.*, 360 U.S. 185; *Hanson v. Denckla*, 357 U.S. 235; *Walker v. City of Hutchinson, supra; Nelson v. City of New York*, 352 U.S. 103; *Covey v. Town of Somers*, 351 U.S. 141; *Chicago Rock Island & Pacific Railroad Co. v. Stude*, 346 U.S. 574; *New York v. N.Y., N.H. & H.R. Co.*, 344 U.S. 293; *U.S. V. Adamant*, 197 F.2d 1 (C.A. Cal. 1952), cert. den. *Bullen v. Scoville*, 344 U.S. 903; *Mullane v. Central Hanover Bank & Trust Co., supra; U.S. v. Petty*, 327 U.S. 372; *Catlin v. U.S.*, 324 U.S. 229; *U.S. v. Miller*, 317 U.S. 369; *Wuchter v. Pizzutti*, 276 U.S. 13; *North Laramie Land Co. v. Hoffman*, 268 U.S. 276; *Bragg v. Weaver*, 251 U.S. 57; *McDonald v. Mabee*, 243 U.S. 90; *Madisonville Traction Company v. Saint Bernard Mining Co.*, 196 U.S. 239; *U.S. v. Dunnington*, 146 U.S. 338; *Roller v. Holly, supra; Arndt v. Griggs*, 134 U.S. 316; *Huling v. Kaw Valley Railway*, 130 U.S. 559; *Pennoyer v. Neff*, 95 U.S. 714; *U.S. v. 625.91 Acres of Land in Dunklin County, Mo.* (S.E.D. Mo. 1943), 49 F. Supp. 997; *U.S. v. 15.3 Acres of Land*, (D.C. M.D. Pa. 1957), 158 F. Supp. 122, 124; *U.S. v. 70.39 Acres of Land* (S.D. Cal. 1958), 164 F. Supp. 451; *State ex rel. State Highway Com. v. Stringer*, 77 Wyo., 310 P.2d 730 (1957); *Hanna v. Stedman*, 230 N.Y. 327 (1921).

There would appear to be no doubt that if the just compensation stage of an eminent domain proceeding is a personal action involving personal rights to the fund, then service of notice by publication cannot be the basis of a judgment in personam against a nonresident. *Pennoyer v. Neff, supra.*

It is noteworthy that in the circumstances of the instant case, the Complaint and Declaration of Taking were filed on June 28, 1971, notice of publication had during February, 1972, and the hearing on just compensation held on January 26, 1973. Petitioner-Administrators filed their post-judgment motion on May 13, 1975 (their certificate of title by their expert having been obtained on May 2), 1975), and the Petitioner-Trustees filed their motion on September 3, 1975 (the standing of the Administrators having been questioned but not ruled upon in the District Court's Memorandum and Order of July 15, 1975).

Petitioners respectfully submit that perhaps the true rule in this: That whatever may be the rule as to notice relative to a sovereign's plenary power over land, and whatever may be the rule in the clearly *in rem* proceeding to transfer title, the question of the *amount, apportionment* and *distribution* of the award — clearly involving only a sum of money — cannot be determined by proceedings without the same notice that would be constitutionally required in an ordinary action at law.

For the reasons stated *supra*, the final judgments of the District Court are void and, hence, a nullity. Therefore, the District Court apportioning and distributing the fund lacked jurisdiction and the Petitioners are entitled to the relief provided in Rule 60(b)(4), despite the fact that Petitioners' motions were filed after the lapse of a year. *Graciette v. Star Guidance, Inc.*, 66 F.R.D. 424, 426 (D.C. S.D. N.Y. 2/14/75); *Lamarche v. Lamarche*, 348 A.2d 22, 23 (R.I., 1975).

Petitioners have stated in their verified motions the following reckless omissions and representations by counsel for DCRLA (an agency of the U.S. Government)

and by counsel for the Institutions during the hearing before the District Court on just compensation:

(a) Counsel for DCRLA did not call to the Court's attention the probable conflicting claims of Foller/Thornton and Rohleder heirs and devisees as against the possible claims of the Institutions, of which he had knowledge or should have had knowledge.

(b) Counsel for DCRLA, rather than withdrawing from the apportionment and distribution proceeding and permitting the conflicting claimants to present proof of their respective interests, clearly allowed the Institutions to use a title policy issued to DCRLA as an exhibit forming the basis of their respective unverified, ex parte petitions warranting their title. The fact that the title policy was prepared for DCRLA was not called to the attention of the court. In fact, counsel for DCRLA assured the Court that DCRLA had determined the respective interests of the Institutions and then he assured the court that he had no objection to the Orders of Distribution and, in fact, concurred with and consented to them.

(c) Counsel for DCRLA had in his possession a title policy dated June 3, 1969, which stated that title was in the Foller/Thornton and Rohleder heirs, subject to a possible exception dependent upon an interpretation of the Will of Elizabeth L. Foller. However, this policy was not submitted in evidence nor called to the attention of the court. Rather, DCRLA permitted a subsequent policy dated January 10, 1973, evidencing a 1/4 interest in each of the Institutions, and the remaining 1/2 interest in the heirs and devisees of Foller/Thornton and Rohleder, to be used by its adversaries, the Institutions, as the basis of their warrant of title. Both policies were prepared

by the same private title company employed by DCRLA.

(d) Counsel for the Institutions did not inform the Court in their unverified, ex parte petitions, that their basis for warranting title, namely the aforementioned title policy of January 10. 1973, was the title policy of their adversary, DCRLA. Moreover, counsel for the Institutions did not inform the court that they had obtained a title report from another private title company, which Petitioners argue on its face was highly suspect. It is strange indeed that the Institutions did not use their own report but, rather, chose to use the January 10, 1973 title policy of DCRLA, its adversary. Regardless, there is no explanation in the transcript of the just compensation hearing.

(e) Counsel for DCRLA and for the Institutions failed to perform their legal duty to conduct a reasonably diligent search of the records of the District of Columbia prior to requesting the District Court to apportion and distribute the just compensation fund to the Institutions.

Petitioners submit that the above outlined averments amount to such reckless conduct on the part of counsel for DCRLA and for the Institutions as to constitute fraud upon the District Court. See *Ernst & Ernst v. Hochfelder*, ___ U.S. ___, No. 74-1042, decided 3/30/76. It may well be that not necessarily all of the omissions and representations are "extrinsic" rather than "intrinsic" fraud upon the court as defined in *U.S. v. Throctmorton*, 98 U.S. 61. However, Petitioners submit that the technical niceties of the distinction between extrinsic and intrinsic fraud are immaterial here, because important

reasons of policy justify — if they do not require — reopening of the January 26, 1973 Judgments, pursuant to the general provisions of Rule 60(b), F.R.C.P., despite the lapse of more than one year. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247.

Petitioners further contend that the combination of insufficient due process notice, the lack of a fair trial on the issues of just compensation and apportionment and distribution of the compensation fund, and fraud upon the court, as aforesaid, at minimum amount to a valid case for the application of Rule 60(b)(6) [any other reason justifying relief] for granting relief from the operation of the Judgments of the District Court entered on January 26, 1973.

In *Pierce v. Cook & Co., Inc.*, 518 F. 2d 720, 722, 723 (10th Cir., 1975), the court set forth the criteria for the application of Rule 60(b)(6):

> "A Rule 60(b) motion is addressed to the sound discretion of the Court. Caribou Four Corners, Inc. v. Truck Insurance Exchange, 10 Cir., 443 F. 2d 796, 799 and cases cited. Quoting 7 Moore Federal Practice at p. 308 (1950 ed.), Radack v. Norwegian American Line Agency, Inc., 2 Cir., 318 F.2d 538, 542, says that Rule 60(b) gives the court a 'grand reservoir of equitable power to do justice in a particular case.' The court goes on to say that 'the rule should be liberally construed when substantial justice will thus be served.' * * * The question is whether we have here an extraordinary situation justifying Rule 60(b)(6) relief."

In order to avoid any misunderstandings, as to Petitioners' purpose in moving to obtain Rule 60(b) relief, they declare that they do not seek to contest the taking of the subject parcel, nor to contest the valuation phase of the just compensation hearing. Their sole aim is to reopen that phase in which the court apportioned and distributed the fund to the Institutions.

Further, Petitioners respectfully inform this Court that on January 19, 1976, they filed a civil action in the Superior Court of the District of Columbia, wherein they sought to obtain a money judgment from the Institutions on an implied contract for money had and received belonging to the Petitioners, and a count to recover damages for negligence from the title company that prepared the title policy for DCRLA. On April 19, 1976, the Superior Court granted the motions of these defendants to dismiss the action on the grounds of res judicata in the herein condemnation action and further, that the action against the title company was barred by the applicable statute of limitations. Petitioners have appealed and this appeal is pending before the District of Columbia Court of Appeals.

Both the District Court and the Court of Appeals have indicated that if Petitioners are entitled to any relief under the circumstances of this case, it must be found within the Tucker Act [28 U.S.C. §§1346(a)(2), 1491]. Of course, it does not follow that the Petitioners will necessarily prevail before the U.S. Court of Claims. Therefore, unless the Supreme Court grants Petitioners' request for Certiorari, it may well be that not only will there remain undecided many vexing and conflicting issues and opinions related to notice for nonresident

owners (both for the taking stage and the just compensation stage) of an eminent domain action and whether reckless omissions by Counsel amount to fraud on the court, but the injustice to Petitioners will remain, that is, that they will not have obtained the just compensation to which they were guaranteed under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL A. CULOTTA
3210 Belair Road
Baltimore, Maryland 21213
(301) 563-0110

FRANK W. MARSALEK
1028 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 659-4216

Dated: September, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2124 September Term, 1975

District of Columbia Redevelopment Land Agency, a body corporate — Civil Action 1278-71

v.

Seven Parcels of Land in Squares 288, 289, 319, 455 and 515 in the District of Columbia, et al

James R. Thornton, Trustee for heirs of Joseph Foller, Deceased Parcel, 515-103, et al., Appellants

v.

Seven Parcels of Land in Squares 288, 289, 319, 455 and 515 in the District of Columbia, et al

James R. Thornton, Trustee for heirs of Joseph Foller, deceased Parcel, 515-103, et al., Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, McGOWAN and ROBB, Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
George A. Fisher, Clerk

(s/ Robert A. Bonner,
By: Robert A. Bonner,
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 8 1976

GEORGE A. FISHER
Clerk

Nos. 75-2124 and 2125 - Thornton et al. v.
District of Columbia Redevelopment Land Agency

MEMORANDUM

Finding no abuse of discretion in the district court's denial of appellants' post-judgment motions to set aside the distribution orders of January 26, 1973 and to order the redeposit of sums paid out with respect to Parcel 515-103, we affirm. We express no opinion on whether appellants may press their claims in a suit under the Tucker Act, 28 U.S.C. §§1346(a)(2), 1491. *See Jacobs v. United States,* 290 U.S. 13 (1933) *Hurley v. Kincaid,* 285 U.S. 95 (1932); *United States v. 22,680 Acres of Land in Kleberg Co., Tex.,* 438 F.2d 75 (5th Cir. 1971); *United States v. Certain Parcels of Land,* 40 F.Supp. 436 (D.Md. 1941); Wright, Miller & Cooper, Federal Practice and Procedure § 3577 (1975).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA
REDEVELOPMENT LAND AGENCY,
Plaintiff,

Civil Action No. 1278-71
Parcel 515-103

v.

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455 and 515 in the District of Columbia, Brewood, Inc. et al., and unknown owners.
Defendants.

MEMORANDUM AND ORDER

Administrators of the Foller and Rohleder estates move to set aside a final order of this Court distributing proceeds in this just compensation proceeding arising out of a DCRLA taking. The Court's Orders were entered in January and February of 1973. Movants now claim that the distribution was made on the basis of two erroneous title searches relied on by the Court and by all parties as furnished by Lawyers Title Insurance Corporation and Columbia Real Estate Title Insurance Company. Movants ask that the distributees, Little Sisters of the Poor and St. Joseph's Home and School redeposit in favor of Foller and Rohleder heirs. Without considering the allegations as to the validity of the title reports, a matter which is sharply contested, the Court held a hearing and took testimony to determine whether or not the motion should be considered.

It appears that prior to the just compensation proceeding full and adequate notice to all "unknown owners" was given by publication. F.R. Civ P. 71A(d)(3)(ii).

There was also actual notice to many of the Foller and Rohleder heirs. None responded. Assuming, without deciding, that the administrators of these long-dormant estates have standing -- which is highly questionable since under the law of Maryland prior to 1969 realty generally appears not to have been part of the estate subject to probate, *see* Comment to Ann. Cd. of Md., Art. 93, § 1-301 (1969) — the motion must nevertheless fail. No basis exists for reopening a final judgment where movants had ample notice, slept on their rights for more than a year and failed to present any evidence of extrinsic fraud. *Cf. United States v. 22.68 Acres of Land,* 438 F.2d 75 (5th Cir. 1971).

Assuming the Government failed to make a "reasonably diligent search of the records" as required by F.R. Civ. P. 71A(c)(2) a separate independent action for just compensation may lie against the United States in the Court of Claims, *see United States v. Certain Parcels of Land in Prince George's County,* 40 F. Supp. 436, 443-4 (D.C. Md. 1941); *United States v. 22.68 Acres of Land, supra,* 438 F.2d at 78; 12 Wright & Miller, *Federal Practice and Procedure* (1973) § 3045 at 103, but that issue is not before this Court.

The motion to set aside the distribution is denied.

SO ORDERED.

/s/ Gerhard A. Gessell
UNITED STATES DISTRICT JUDGE

July 15, 1975.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, a body corporate,

Plaintiff,

vs.

C.A. 1278-71

SEVEN PARCELS OF LAND IN SQUARES 288, 289, 319, 455 and 515 IN THE DISTRICT OF COLUMBIA, BREWOOD, INC., ET AL., AND UNKNOWN OTHERS.

Defendants.

FILED
OCT 1 1975
JAMES F. DAVEY
Clerk

ORDER

Upon consideration of the motion of James R. Thornton and Edward Davis to set aside distribution orders of January 26, 1973 and for other relief and the memoranda submitted in support thereof and in opposition thereto, it is this 30th day of September 1975 hereby

ORDERED that the motion to set aside distribution orders of January 26, 1973 and to order re-deposit of sums erroneously paid out of court's registry with respect to parcel 515-103 be, and the same hereby is, denied.

/s/ Gerhard A. Gessell

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

Service:

David A. Clarke, Jr., Esquire
Frank W. Marsalek, Esquire
Samuel A. Culotta, Esquire
Ross O'Donoghue, Esquire
David J. Hensler, Esquire